89-1109

No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1989

PATRICIA MASON,

Petitioner,

v.

CITY OF GASTONIA, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN W. GRESHAM*
C. MARGARET ERRINGTON
Ferguson, Stein, Watt,
Wallas, Adkins &
Gresham, P.A.
Suite 730
700 E. Stonewall Street
Charlotte, N.C. 28202

Counsel for Petitioner

*Counsel of Record

QUESTION PRESENTED

1. Did the Fourth Circuit violate Rule 52, F.R.C.P., and the Seventh Amendment when it overturned the concurrent findings of fact of the jury and the district court judge in this case?

2. Is it arbitrary and capricious for a municipality to dismiss an employee because the employee refuses to execute a release waiving constitutional and legal claims against the city?

PARTIES

The petitioner in this Court is Patricia Mason. The respondents are the City of Gastonia, and nine individuals: Bob Adams, Joe Davis, Roger Kayler, Henry Connor, Ronnie Ransom. Glendell Brooks, W. B. Brooks, Gary Hicks, and Jim Philyaw.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES **Pages**

AMENDMENTS

STATUTES AND RULES

PUBLICATIONS

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

PATRICIA MASON,

Petitioner,

v.

CITY OF GASTONIA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Patricia Mason, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Courts of Appeals for the Fourth Circuit entered in this proceeding on August

16, 1989.

OPINIONS BELOW

The decision of the Fourth Circuit is unpublished, Table of Cases, 884 F.2d 1389 (4th Cir. 1989), and is set forth at 36a of the Appendix. The order of the Fourth Circuit denying rehearing and rehearing en banc, which is not yet reported, is set out at p. 69a of the Appendix. The previous decision of the Fourth Circuit in this case is unpublished, Table of Cases, 840 F.2d 11 (4th Cir. 1988), and is set forth at p. 17a of the Appendix. The Findings of Fact and Conclusions of Law of the district court, entered on April 21, 1987, which are not reported, are set out at p. 1a of the Appendix.

JURISDICTION

The original decision of the Fourth Circuit was entered on August

16, 1989. A timely petition for rehearing and suggestion for rehearing en banc was denied on October 3, 1989. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of common law.

Rule 52(a), Federal Rules of Civil Procedure, provides in pertinent part:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

STATEMENT OF THE CASE

The events giving rise to this litigation are a civil analogue to the problem confronted, in a criminal context, in Newton v. Rumery, 480 U.S. 386 (1987). The dispute in this case began in September, 1983, when petitioner and another Gastonia City employee, Blair Wilson, were fired for alleged negligent misconduct. While the dismissal was still under review by city authorities, petitioner adduced evidence including an eyewitness and a lie detector test, demonstrating that she was not culpable. The Gastonia City Council then voted to rescind the dismissals, and restore the two employees to work, providing each employee would execute a release waiving any constitutional or legal claims they might have against the city for the

period of time they had been out of work. Petitioner, although ready and willing to return to work, refused to execute the release demanded by the City Council. As a result of that refusal, under the terms of the City Council's decision, she was permanently discharged.

(1) Events Prior to the Demand for a Release

The particular event which triggered this litigation occurred in the afternoon of September 14, 1983, in the Collections Department of the City of Gastonia. Prior to that date there had been a number of serious, and politically embarrassing, lapses in security. On two occasions the Department safe had been found open after it should have been closed, and in one of those instances money was stolen. Both the city Finance Director, James Philyaw, and the City

Manager, Gary Hicks, had been publicly criticized because of these incidents. Petitioner, a model employee, worked in another department at the time, and had no involvement in these earlier events. Prior to September, 1983, she was transferred into the Collections Department and given responsibility for closing the safe at the end of the business day.

At the end of business on September 14, 1983, petitioner testified, she properly closed and locked the safe. Blair Wilson steadfastly testified that he personally confirmed that the safe was locked. Both initialed written logs stating that they had, respectively, locked and secured the safe. Approximately fifteen minutes later, however, Philyaw entered the room in which the safe was located

and found the door ajar. The police were called in to investigate the matter, and to ascertain how the safe door came to be open. The police report proved inconclusive.

Two days later petitioner and Wilson were fired. Their dismissal was announced in a memorandum ostensibly from James Philyaw to the City Manager and others. Significantly, however, although the report referred only to its author, the body of the report repeatedly referred to findings and a determination that "we" had made. The report asserted that the police had concluded the door was left open as a result of negligence on the part of petitioner and Wilson:

> The detectives have stated that the leaving of the Utility Collection safe open at the close-of-business on Wednesday, September 14, 1983, was caused by carelessness on

> the part of the Clerical Supervisor [petitioner] and the Utility Accounts Administrator [Wilson].

(J.A. 753).[1] The report referred to the female employees of the Collections Department as "the girls." (J.A. 751).

Petitioner and Wilson both appealed their dismissal to the City Manager, who was suppose to conduct an impartial reassessment of that disciplinary decision. Unbeknownst to either petitioner or Wilson at the time, the City Manager was in fact the other individual referred to in the September 16, 1983, memorandum announcing that "we" had decided that petitioner and Wilson were guilty of misconduct. The City Manager's role in the September 16 decision only

---

1 References to J.A. are to the Court of Appeals Appendix. References to Tr. are to the trial transcript. PX indicates plaintiff's exhibits at trial.

came to light in pre-trial discovery several years later.

In the proceedings before the City Manager petitioner adduced overwhelming evidence exonerating her of the charge of carelessness. An actual copy of the police report and the police officer's testimony revealed that, contrary to the assertion in the September 16 memo, the police had not concluded that petitioner or Wilson were careless or responsible in any way for the safe being open. An uninvolved eyewitness, Alberta Pratt, testified that she had personally seen Wilson check the safe after petitioner had locked it to insure that it was closed. It was revealed that in the room with the safe one of the windows was unlocked. The police reported that the outside of the safe contained no fingerprints whatever,

suggesting that someone may have wiped all fingerprints from the safe and handle shortly before it was found ajar.

Potentially the most important evidence concerned access to the combination of the safe. The September 1983 memo had assumed that only petitioner had access to the safe's combination; were that true, it was unlikely that anyone else could have opened it after she closed it. The only written copies of the combination, ostensibly known only to petitioner, were in two sealed envelopes kept in the office of Philyaw and Wilson and the seals were unbroken. However, at the close of the proceeding counsel for petitioner and the City Attorney jointly discovered that the combination in the sealed envelopes was plainly visible if the envelopes were held in

front of the fluorescent lights in the city offices. As a practical matter, a large number of city employees were able to learn the purportedly secret combination. (J.A. 371, Tr. 251).

In the face of this exculpatory evidence the City Manager declined to make any finding that petitioner or Wilson had been personally negligent. The City Manager nonetheless approved their dismissal, not because they were guilty of misconduct, but on a theory that they should be held strictly liable for anything that went wrong in connection with the safe. The City Manager's letter to petitioner explained her dismissal in two terse sentences:

> As Collections Supervisor, you had direct responsibility for the security of the safe. Therefore, by virtue of your position, you are accountable for incidents

> that occur within your purview.

(J.A. 757). The District Judge subsequently analogized the City Manager's standard to the Navy Department rule holding a ship's captain strictly liable for anything that goes wrong on his vessel. (Tr. 386, J.A. 506).

Although the City rules and ordinances provided no express right of appeal from a decision of the City Manager, the City Council chose to review his actions and agreed to hear the objections of Wilson and petitioner to the dismissal. The matter was taken up at a City Council meeting on November 15, 1983. After counsel had given a brief summary of all of the exculpatory evidence, the council requested and petitioner agreed to take a lie detector test concerning the incident. The City

Council deferred action until it had the results of that test. Both petitioner and Wilson passed a lie detector test conducted by the city's examiner, which confirmed they had told the truth when they stated they had, respectively, closed and checked the safe on September 14. The city officials evidently regarded the result of the lie detector tests as dispositive; in light of this outcome the City Manager conceded that there was "no evidence" that petitioner had left the safe door open. (Tr. 247, J.A. 367).

The next public meeting of the City Council regarding this issue was on December 6, 1983, the day which the Council announced its decision. Between these two public meetings, however, there was another, secret meeting between the City Council and Finance Director Philyaw. At the

secret meeting Philyaw made a number of entirely new allegations of misconduct by petitioner; the allegations evidently influenced the Council to some degree, because they were reiterated in the Council's published decision.[2] Petitioner, however, had neither any notice of the charges nor any opportunity to respond to them. The first petitioner learned of the new allegations was when they appeared in the City Council's final decision. Petitioner did not learn of the secret meeting, or that Philyaw had proffered the charges, until they were revealed several years later in the course of pre-trial discovery.

---

2 The defendants made no effort at trial to substantiate or even reiterate these allegations. Neither the district court nor the court of appeals attached any weight to them. The decision is set forth at p. 71a of the appendix.

(2) The Requested Release

In light of the overwhelming exculpatory evidence, particularly the lie detector test, the City Council effectively abandoned the allegation of misconduct for which petitioner had originally been charged: that she had left the safe door open on the day in question. Accordingly, the City Council's December 6, 1983, resolution neither accused petitioner of carelessness, nor asserted that she could be held strictly liable for events for which she was not culpable. The City Council resolution overturned the original dismissal order, and provided that both petitioner and Wilson could return to work "tomorrow morning at 8 a.m." with "their same pay and seniority." (PX 20, App. 71a).

The rescission of the dismissal

order, however, was subject to one critical condition; petitioner and Wilson would first have to waive any claims against the city arising out of the incident. The waiver would preclude them, particularly, from seeking any award of back pay for the three months they were out of work. The relevant portions of the City Council's decision were as follow:

4. Pat Mason and Blair Wilson shall sign a release and a covenant not to sue the City of Gastonia for any and all events connected with the open safe on September 14, 1983.

5. If the covenant not to sue and the release are not signed by 5 p.m. this day, then the party not signing shall not be allowed to return to work tomorrow morning.

6. If the release and covenant is not signed, the City Manager shall consider the job Vacant and shall immediately advertise to fill the vacancy.

7. The release and covenant not to sue shall be prepared by the City Attorney and shall be

available by 2 p.m. this date.[3]

Under the terms of the decision petitioner and Wilson were given three hours to decide whether to execute the release or lose their jobs. Wilson chose to execute the release; he later explained that for financial reasons he was compelled to accept whatever conditions the city might impose as a condition for restoration to his job.[4] Petitioner, on the other hand, refused to sign the release.[5] When petitioner failed

---

3 PX 20, App. 71a. The resolution recites that it was adopted at 12:15 p.m.. Id.

4 "I need to work. I was only three and a half years from retirement. I had a kid in college and jobs weren't easy to find." (Tr. 115, J.A. 234).

5 Q. Did you accept that offer? [sign release and return to work]

A. No I didn't.

Q. Why not?

A. Well, I had to let them know

to meet the three hour deadline, her position was declared vacant.

(3) Subsequent Judicial Proceedings

Petitioner commenced this action in the United States District Court for the Western District of North Carolina, alleging that her dismissal violated due process, and was arbitrary and capricious. The due process claim was based on petitioner's contentions that neither the City Manager nor the City Council were neutral, unbiased decisionmakers, and that the secret meeting between the Council and Philyaw denied her reasonable notice

---

> by 5:00 o'clock that day and I knew that I had been done wrong and I had done everything they asked me to do, take the tests and all and then they still don't want to compensate me and then they are trying to take away my rights.

(Tr. 52, J.A. 171)

and any opportunity to be heard regarding the new charges made by Philyaw.

The case was tried in January of 1987. Petitioner's attack on the fairness of the City Manager rested on two types of evidence--first, that he had made up his mind prior to the October, 1983, hearing, and was for all practical purposes reviewing his own decision to dismiss petitioner, and second, that the City Manager had lied under oath when he denied involvement in the September, 1983, decision to dismiss petitioner.[6] The district court noted that there was sharply conflicting testimony on this issue.[7] Petitioner relied on several circumstances as showing partiality and unfairness on the part of the

---

6 Tr. 143-144, 165-167, 222, J.A. 262-263, 284-286, 341.

7 Tr. 386, J.A. 506.

City Council, the secret meeting with Philyaw (Tr. 302, 312-13, 368-69, 403), the Council's fear of embarrassment if they could not find a scapegoat for the safe incident (Tr. 313-15), and the Council's refusal to reinstate petitioner unless she waived her claims. (Tr. 316). Counsel for petitioner also argued that petitioner had been treated less fairly because of her sex:

> How many times did you hear the evidence that women who worked down there in the Collections Department were the girls down there. You heard it from the lawyers, you heard it from the witnesses . . . . She was just one of the girls down in Collections. I think you need to send the City of Gastonia through its Councilmen and Manager a message . . . . that you don't consider hardworking folks who spend eight years of their life doing good work just one of the girls. That you consider them people who have rights and who, when they do their

work, should not have their rights violated.

(Tr. 322, App. 442).

Counsel for the city and the individual defendants did not seek to prove, or argue, that petitioner had left the safe open or was otherwise at fault. On the contrary, defense counsel repeatedly and expressly accepted as truthful petitioner's assertion that she had indeed closed the safe.[8] The defendants took no position as to how the safe came to be open, professing bafflement as to who had opened it.[9] The members of the City Council, although named as defendants, all chose not to testify.

---

8 Tr. 337, J.A. 457. ("Pat Mason took the stress test, so did Blair Wilson, and it all came out everybody was telling the truth"); 356 ("They took [the lie detector test] and they all showed up truthful, all of them.")

9 Tr. 12, J.A. 1319. ("so the question is, who opened the safe. We don't know.")

The central justification advanced by defense counsel for the action of the City Council, offering reinstatement conditioned on a waiver, was not that petitioner was in fact guilty of misconduct, but that the offer was an attempt by the Council to fashion a reasonable compromise between the City Manager and the dismissed employees.[10]

---

10 Tr. 337, J.A. 457. ("So the City Council considered the matter, and after deliberation, decided that they would try to settle it and I argue to you they tried to be fair. . . .Now, they're not lawyers, they're not people who run a court, but that sounded reasonable to them and it sounds reasonable to me. . . . "). Tr. 343-44, J.A. 463-464. ("Then they had another meeting of Council and decided. . . . to change the City Manager's decision and decided to reinstate her. . . . provided she would waive any rights of remuneration for the past, a compromise which they tried to do. Bear in mind these are plain everyday citizens sitting on the Council trying to run a City, not judges or lawyers running a court and I argue to you that their action was fair. What else could they do?") Tr. 357, J.A. 477. ("the City Council, in an

The jury was instructed that it could base liability on either petitioner's procedural due process claims or on petitioner's procedural due process claims or on petitioner's claim that her dismissal was arbitrary and capricious. The district court instructed the jury regarding what conduct would violate

---

attempt to be fair to everybody, said. . . .we will agree to let them come back. . . . But now, it costs money to bring lawsuits and to defend lawsuits. We're going to be nice to these people and be fair to them. We don't want to spend extra taxpayers' money to. . . . have to litigate the question of the back pay. . . . It's a release. It says, let's get beck to work and quit fiddling with this thing. . . . Nobody settles disputes like this without release. It's not asking anybody to give up anything, many constitutional rights. . . .[W]ho are the City Council?. . . . They are just a bunch of good, hardworking honest citizens who are trying to do their best and they are trying to do what is right and fair. . . . They just want to be fair." Tr. 361, J.A. 481. ("the members of the City Council. . . . came up with an agreement and a compromise they thought was fair and just and proper. . . .").

procedural due process rights or be arbitrary and capricious. The defendants voiced no objections to those instructions. The jury returned verdicts in favor of petitioner on both claims, finding that the defendants had failed to "provide plaintiff a fair hearing before a neutral, unbiased decisionmaker" and that the defendants had violated due process by firing petitioner "arbitrarily and capriciously." (J.A. 550-551). The jury awarded petitioner $75,000.00 in compensatory damages and $1,600 in punitive damages. (Id.).

The district judge denied defendant's motion for judgment N.O.V.. Petitioner then filed a motion with the district judge seeking certain equitable relief. In granting the requested relief the district judge, as contemplated by

Rule 52, F.R.C.P., made his own Findings of Fact regarding the merits of petitioner's claims, expressly finding both that she had been denied "a neutral and unbiased fact finder" and that her dismissal was arbitrary and capricious. (App. 3a).

The defendants all appealed. The court of appeals initially remanded the case to the district court for an additional determination as to whether the petitioner had a property right in the job at issue. (App. 17a-25a). On remand the district court found that petitioner had such a property right. (App. 35a).

The defendants again appealed. On this second appeal the Fourth Circuit reversed on the merits both the jury verdict and the decision of the district court awarding equitable relief. The Court of Appeals held,

contrary to the findings of the jury and district judge, that petitioner had been afforded a hearing before a neutral, unbiased fact finder, and that her dismissal was neither arbitrary nor capricious. (App. 65-66a, 68a).

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals is Inconsistent with Anderson v. Bessemer City, 470 U.S. 564 (1985); International Terminal v. Nederl, 393 U.S. 74, (1968); Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962); and Rogers v. Missouri Pacific Railroad Co. 352 U.S. 500 (1957), and is in conflict with the prevailing standard of review in other circuits.

This case presents yet again the inexplicably recurrent Fourth Circuit practice of making de novo findings of fact on appeal. For years the circuit has made such de novo findings to overturn findings of fact made by district court judges; this history of systematic disregard for

Rule 52, F.R.C.P., is recounted at length in the petition for certiorari in Anderson v. Bessemer City, 470 U.S 564 (1985), No. 83-1623. The specific admonition by this Court in Anderson that the Fourth Circuit had "improperly conducted what amounted to a de novo weighing of the evidence in this record" 470 U.S. at 576, did not curtail the practice of disregarding Rule 52.

Appellate panels in the Fourth Circuit have also systematically made de novo factual findings in cases originally tried by civil juries, reversing any jury verdicts inconsistent with the appellate court's own view of the facts. The history of this practice is recounted in the petition for writ of certiorari in Cobb v. Nizami, No. 88-6113, cert. den. 109 S. Ct. 1177 (1989).

The instant case, involving concurrent and independent findings of fact by both the district judge and the trial jury, involves both Rule 52 and the Seventh Amendment. On January 26, 1987, the jury returned a verdict finding that the defendants had failed to provide plaintiff with "a fair hearing before a neutral, unbiased decision maker." (App. 550). On April 21, 1987, the district court, acting on plaintiff's request for injunctive relief, made a finding of fact that "[t]he defendants violated plaintiff's right to procedural due process in that the defendants failed to provide plaintiff a hearing before a neutral and unbiased fact finder." (J.A. 549). The Fourth Circuit held, to the contrary, that the factfinder was indeed fair and neutral. (App. 65-66a). Both the jury, (J.A. 551), and

the district judge, (J.A. 549), found that the decision to fire petitioner was arbitrary and capricious. The Fourth Circuit, based on its own account of facts, insisted that the dismissal was not the least arbitrary and in fact was entirely justified. (App. 60a, 68a). The appellate decision did not turn on any question of law; the defendants never objected to the jury instructions, and the circuit court never criticized, or even mentioned, those instructions. The circuit court simply, indeed brazenly, concluded that the jurors and district court had reached the wrong factual conclusions.

As we set forth below, the opinion of the court of appeals in this case is inconsistent with a series of decisions in this Court, most recently Anderson v. Bessemer City, 470 U.S. 564 (1985), regarding

the standard of review under Rule 52, F.R.C.P., of district court findings of fact. The opinion is also inconsistent with a long line of decisions in this Court, such as Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) interpreting the Seventh Amendment to severely restrict the authority of the appellate courts to overturn jury verdicts in civil cases.[11] There is already pending before the Court, however, another case which presents a dispute about these standards of review. In Lytle v. Household Manufacturing, Inc., No. 88-334, the respondent is contending that an assertedly improper denial of a jury trial was harmless error because a

---

11 A complete discussion of this Court's decisions in protecting a party's right to a jury determination is contained in Schnapper, Judges Against Juries, 1989 Wis.L.Rev. 237 (1989)(hereinafter Schnapper).

directed verdict would have been proper had the case been tried to a jury. The briefs in Lytle discuss in some detail the differing roles of trial juries, trial judges and appellate courts. The Lytle decision may well shed light on the issues raised by the instant petition. Accordingly, it may be appropriate to defer action on the instant petition until Lytle has been decided, and then to assess whether Lytle provides a basis for vacating and remanding the decision in this case.

The clearest demonstration of prevailing Fourth Circuit practice is the text of the opinion in this case. Aside from the second and third sentences of the opinion, there is no reference to the existence of a jury verdict in this case; the district judge's Findings of Fact are never mentioned by the appellate court at

all. If the first and last paragraphs of the opinion were omitted, a reader literally would find nothing in what remained to disclose that the opinion was that of an appellate court, rather than that of a district judge after a nisi prius bench trial. Totally absent from the opinion are references to any of the following:

(a) Rule 52, F.R.C.P.

(b) The Seventh Amendment

(c) Anderson v. Bessemer City, 470 U.S. 564 (1985)

(d) Pullman-Standard v. Swint, 456 U.S. 273 (1982)

(e) The decisions of this Court expounding the commands of the Seventh Amendment.

The appellate panel did not purport to assert that the district judge's findings were clearly erroneous. The appellate panel does not contend that a directed verdict, or judgment n.o.v., would have been proper. The

opinion makes no mention of either of these issues; it simply sets forth the appellate court's own views of the facts, and holds that those facts demonstrate that no constitutional violation occurred.

The decision in the instant case, although inconsistent with the decisions of this Court and the practice in other circuits, is entirely typical of recent decisions in the Fourth Circuit. In Williams v. Cerberonics, 871 F. 2d 452 (4th Cir. 1989), an appellate panel, over the dissent of Judge Phillips, rejected a jury verdict of racial discrimination. The majority and dissenting opinion contain patently conflicting accounts of what evidence was in the record in the case. In Kline v. Lorillard, Inc., 878 F. 2d 791 (4th Cir. 1989), another appellate panel, in this instance

over the dissent of Judge Sprouse, rejected a jury's interpretation of a written agreement between the two litigants. In National Bank of Washington v. Pearson, 863 F. 2d 322 (4th Cir. 1988), the court of appeals rejected a jury finding that the defendants had acted with malice; the appeals court acknowledged that there was evidence the defendants had used "inaccurate and intemperate language", but concluded that "we do not doubt" that it was justified. 863 F.2d at 329 (Emphasis added). In Dalton v. Mercer County Board of Education, 887 F.2d 490 (4th Cir. 1989), the Fourth Circuit overturned a jury's finding that denied the plaintiff a promotion because of his age; the circuit court insisted the defendants rejected the plaintiff because of a seniority rule, dismissing as "no evidence" of

discrimination the fact that the promotion actually made violated the very seniority rule on which the defendants relied in rejecting the plaintiff. 887 F.2d at 491 n. 4. See also Straitwell v. National Steel Corporation, 869 F.2d 248 (4th Cir. 1989)(reversing jury verdict).

The instant case is a particularly extreme example of the recurrent Fourth Circuit practice, and an unusually clear example of the dangers inherent in appellate factfinding. The Fourth Circuit, for example, expressly found that petitioner had carelessly left open the safe on September 14; indeed, the panel thought it quite obvious that she had done so:

> There was actually no dispute on the facts relating to Ms. Mason's initial su[spension] and later termination. Nor could there have been much dispute about the action

> taken. . . . It was clearly a case. . . . of carelessness.

(App. 58-59a)(Emphasis added). In fact, as set out above, the City Manager acknowledged there was no evidence of carelessness, and the defendants at trial repeatedly and expressly accepted as truthful petitioner's statement that she had closed the safe. (See p. 15,,21, supra.) The Fourth Circuit insisted petitioner must have been at fault because "[o]nly three people had access to the safe through their possible access to the combination". (App. 59a). In fact, the City Attorney acknowledged, and the City Council expressly found, that the combination was widely accessible because it could be read through the envelope in which it had been placed. (See p. 10,11, supra).

The panel's findings regarding

the fairness of the factfinding is tainted by other palpable and inexplicable factual errors. The circuit court asserted that the City Manager's possible bias was unimportant because she was afforded a pretermination hearing (App. 56-57a); in fact petitioner was fired on September 16, 1983, well before her hearing in front of the City Manager. (J.A. 752, 757). The panel opinion twice asserts that the City Council made a fair and independent evaluation of the charges because the Council had before it a transcript of the hearing before the City Manager (App. 51a, 58a); in fact, however, the hearing was not transcribed.[12] The panel insisted

---

12 The only mention of a transcript in the record before the Court of Appeals is a footnote in a brief filed two and a half years after the Council meeting which states in part "counsel for Plaintiff has a tape

the proceedings before the allegedly biased City Manager were merely a "preliminary hearing", (App. 64a); at trial, however, the defendants repeatedly insisted that the City Manager was to make the final decision (Tr. 340, 342, 357, J.A. 460, 462, 477), and the city regulations and ordinances all treat the Manager's decisions on disciplinary matters as final. (J.A. 663, 735, 758). The circuit court asserted "[t]here is no real charge of partiality" against the City Council (App. 65a); in fact the fairness of the Council, particularly in light of the secret meeting with Philyaw, was directly and repeatedly attacked at trial.[13]

---

recording of the hearing which has not yet been transcribed." (J.A. 85)(emphasis added).

13 Tr. 302, 312-13, 368-69; J.A. 422, 432-33, 488-89).

A recent study of the reversal rates of each circuit court of appeal demonstrates the degree of conflict among the circuits regarding the appropriate standard of review for jury verdicts.

Circuit	Reversal-Reduction Rate
Ninth	11.1%
First	22.2%
Sixth	26.3%
Eleventh	37.5%
Tenth	45.5%
Fifth	45.5%
Third	50.0%
Eight	53.1%
Seventh	56.7%
Fourth	63.6%
District of Columbia	66.7%
Second	70.0%

Schnapper, supra, 1989 Wis. L. Rev. at 251.

This disparity between reversal rates is attributable to the disparity between the standards applied by the different courts. Schnapper, supra, at 259-313.

A number of the appellate courts adhere to this Court's admonition

that the Seventh Amendment mandates very limited appellate review of a trial judge's denial of a judgment n.o.v. Lavender v. Kurn, 327 U.S. 645, 653 (1946). "Such a motion should be granted only upon a determination that the evidence could lead a reasonable man to but one conclusion, a determination made without evaluating the creditably of witnesses or the weight of evidence at trial." Cazzolla v. Codman & Shurtleff, Inc., 751 F.2d 53 (1st Cir. 1984). These courts acknowledge that the review of evidence and the inferences fairly drawn therefrom must be made in the light most favorable to the prevailing party. Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985). The Fourth Circuit does not consistently apply this standard, however. Thus, under the standards enunciated in Cazzolla

and Wildman the petitioner would have easily prevailed. Under the de novo review conducted by the Fourth Circuit where all factual disputes are resolved in the light most favorable to the defendants she did not. (App. 64a).

The protections of the Seventh Amendment must not depend on whether a party seeks redress in Charlotte, North Carolina or Providence, Rhode Island. The conflict among the circuits on this issue of constitutional impact requires this Court's resolution.

For, as Chief Justice Rehnquist has noted:

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny . . . a safeguard too precious to be left to the whim of. . . the judiciary. . . Trial by a jury of laymen rather than by the sovereign's judges was important to the

> founders because juries represent the layman's common sense, . . . and thus keep the administration of law in accord with the wishes of the community. . . Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343-44 (Rehnquist, J. dissenting)

II. The Decision of the Court of Appeals is Inconsistent With Ford Motor Co. v. EEOC, 458 U.S. 219 (1982), and Newton v. Rumery, 480 U.S. 386 (1987).

Petitioner was originally dismissed in September, 1983, based on a charge that she had negligently left open the city safe. As the defendants acknowledged at trial, by December of 1983 they no longer had any basis for believing that petitioner had done so.[14] The City

14 "Q. You were present when the City Council was made aware of [the results of the lie detector test], weren't you?

Council then voted to restore petitioner and Wilson to their jobs. The City Council insisted, however, that both first execute a release of all claims against the city arising out of the mistaken dismissals. Had petitioner been willing to do so, she would have been back at work the next day. Petitioner lost her job for one reason and one reason only--she refused to sign the release and covenant not to sue that had been drafted by the Gastonia City Attorney. In this respect the facts of this case have always been entirely undisputed; even the Fourth Circuit acknowledged that petitioner would not have been fired had she

---

A. Yes, sir.
Q. At that point, you had no evidence that Ms. Mason has actually left the safe door open that day, did you?
A. That's correct."

Testimony of City Manager Hicks, J.A. 367.

agreed to the release. (App. 52a).

The district judge instructed the jury that a "discharged employee is not required to accept a job offered by the employer on the condition that his claims against the employer be compromised." (Tr. 397, J.A. 517). The defendants voiced no objections to this instruction. The Court of Appeals correctly observed that petitioner would have been back at work on December 7, 1983, but for her "refusal to accept" the loss of three months salary (App. 66a), i.e. but for her refusal to sign the required release. The Fourth Circuit held that the dismissal was entirely constitutional because there was a "rational basis for the Council's decision" to refuse to reinstate petitioner if she did not execute the release. (App. 68a).

A government decision is

arbitrary and capricious if it fails to serve a rational governmental purpose. Thus, Gastonia could not have conditioned petitioner's reinstatement on some condition unrelated to any legitimate government function, e.g. by requiring her to agree to have a meretricious relationship with a member of the City Council. Although the City of Gastonia would under some circumstances have a legitimate interest in obtaining a relase of claims against it, those interests are narrowly circumscribed by this Court's decision in Newton v. Rumery, 480 U.S. 386 (1987). Newton makes clear that, in the criminal context, officials cannot use release-dismissal agreements simply as a device to save money by immunizing themselves, or the government, from meritorious claims. There must be an

"independent, legitimate reason to make this agreement." 480 U.S. at 398 (emphasis added). Justice O'Connor warned:

> Permitting such releases may tempt public officials to bring frivolous criminal charges in order to deter meritorious civil complaints. ... The coercive power of criminal process may be twisted to serve the end of suppressing complaints against official abuse, to the detriment not only of the victim of such abuse, but also of society as a whole.

480 U.S. at 400. Had Gastonia officials in the instant case used the threat of criminal charges to induce petitioner and Wilson to sign releases, those releases would clearly have been invalid under Newton. Newton necessarily rejects the Fourth Circuit's cavalier assertion that it is "rational" for government officials to coerce releases whenever they have the power

to do so.

The result is no different under Newton where, as here, a release was coerced by a threat to deny reinstatement to a City employee who had a protected interest in her job and who had shown that the original allegations of misconduct were false. The rationale of the opinions in Newton is not limited to releases obtained through a threat of criminal prosecution. Non-criminal sanctions, particularly the loss of a job, can be equally or more coercive under certain circumstances. The plaintiff in Newton faced only the risk and expense of a possible criminal trial at some future date; in the instant case, petitioner and Blair Wilson knew with absolute certainty that their reemployment the next morning depended on executing the proferred release.

The decision below also cannot be reconciled with Ford Motor Co. v. EEOC, 458 U.S. 219 (1982), on which the district court relied in giving the instruction quoted above. Ford Motor admonished that a "discharged employee is not required to accept a job offered by the employer on the condition that his claims against the employer be compromised." 458 U.S. at 232 n.18. This passage in Ford Motor was intended to make clear that such a conditional reinstatement offer could not be used by an employer to reduce the amount of damages an improperly dismissed employee could obtain. A fortiori, surely an employer cannot use such a crassly conditional offer to legitimize completely the unjustified dismissal of an employee, not reducing but totally eliminating the employer's potential liability for

the unjustified act.

If on December 6, 1983 the City Council had required all city employees, on pain of dismissal, to release the City from any then existing claims, the releases would have been invalid, and any dismissals of resisting employees would have been unconstitutional. In this case the City Council singled out petitioner and Wilson for such treatment simply because it knew that the September 1983 dismissal was unfounded. The Fourth Circuit thought the city's treatment of petitioner "reasonable" because it was "similar" to the earlier treatment of another employee, Sandy York. (App. 60a, 66a). But the treatment of York was in fact different in two critical respects -- first, she was in fact guilty of misconduct, and second, although York

was suspended without pay for a period, she was never required, as a condition of reinstatement, to execute any release or covenant not to sue.

This issue is of continuing importance to large numbers of government employees. Under the decision of the Fourth Circuit a government agency is free periodically to immunize itself by requiring all employees, on pain of dismissal, to waive any accrued constitutional or statutory claims they might have. Every municipality in the states comprising the Fourth Circuit is now at liberty to use such threats to protect itself from liability for violations of federal law, and no government employee in those states can look to the federal courts to protect them from such coercive tactics. Neither Newton v.

Rumery nor Ford Motor Co. v. EEOC permit implementation of the coercive measures used in this case in a bald attempt by city officials to obtain just such immunity.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the Fourth Circuit. In the alternative, it may be appropriate to defer action on this petition until Lytle v. Household Manufacturing Inc., No. 88-334 is decided.

Respectfully submitted,

JOHN W. GRESHAM
MARGARET ERRINGTON
Ferguson, Stein, Watt,
Wallas Adkins &
Gresham, P.A.
700 South Stonewall St.
Suite 730
Charlotte, NC 28202
704-375-8461

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION
C-C-85-478-M

PATRICIA MASON,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF GASTONIA; BOB ADAMS; JOE DAVIS; ROGER KAYLER; HENRY CANNON; RONNIE RANSOM; GLENDELL BROOKS; W. B. BROOKS; GARY HICKS and JIM PHILYAW,	)
	)
Defendants.	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Filed April 21, 1987)

This is an action pursuant to 42 U.S.C. § 1983, seeking mandatory, declaratory and equitable relief on account of alleged violations of plaintiff's Fourteenth Amendment rights to procedural and substantive due process. The case was tried to a

jury on January 20, 21, 23 and 26, 1987, at Charlotte, North Carolina.

The jury rendered a verdict in favor of the plaintiff finding that the defendants had violated plaintiff's procedural and substantive due process rights. The jury awarded to the plaintiff compensatory and punitive damages.

The plaintiff has now filed a motion for supplemental relief and declaratory relief and the defendants have filed motions for judgment notwithstanding the verdict and for a new trial.

On March 4, 1987, the court conducted a hearing on the pending motions. Based upon the competent evidence of record and upon argument of counsel, the court makes the following:

FINDINGS OF FACT

1. The regulations of the City of Gastonia, which were in effect at the time of plaintiff's discharge, created a property interest in employment with the City of Gastonia such that plaintiff was entitled to the protection of the Fourteenth Amendment.

2. The defendants violated plaintiff's right to procedural due process in that the defendants failed to provide plaintiff a hearing before a neutral and unbiased fact finder.

3. Further, the defendants violated plaintiff's right to substantive due process by arbitrarily and capriciously discharging plaintiff from her job.

4. There is substantial evidence in the record to support the jury's verdict and the findings of fact in this order.

CONCLUSIONS OF LAW

1. Based upon the findings of fact that the defendants have violated plaintiff's rights under the Fourteenth Amendment, the plaintiff is entitled to equitable relief that will make her whole for the violations of her constitutional rights.

2. Based upon the evidence in this case the defendants are not entitled either to a judgment notwithstanding the verdict or to a new trial.

This 20th day of April, 1987.

JAMES B. McMILLAN
United States District Judge

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION
C-C-85-478-M

PATRICIA MASON,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF GASTONIA; BOB ADAMS; JOE DAVIS; ROGER KAYLER; HENRY CANNON; RONNIE RANSOM; GLENDELL BROOKS; W. B. BROOKS; GARY HICKS and JIM PHILYAW,	)
	)
Defendants.	)

ORDER
(Filed April 21, 1987)

This case was tried before a jury, and the jury entered a verdict as appears of record in favor of the plaintiff on January 26, 1987. Plaintiff's counsel was directed to file and serve proposed findings of fact, conclusions of law and an

appropriate judgment.

On March 31, 1987, defendants' counsel filed a "NOTICE OF APPEAL" to the Fourth Circuit Court of Appeals, from what was stated to be a "final judgment denying Defendants' Motion for a New Trial and for a Judgment Notwithstanding the Verdict entered in this action on the 4th day of March, 1987, and from the judgment and verdict entered on January 27, 1987."

No judgment of any kind has been entered in this case, and there does not appear to be anything from which an appeal up to this time could be taken.

Counsel for the plaintiff on April 2, 1987, tendered a proposed judgment and proposed findings of fact, conclusions of law and order. The court has examined the proposed judgment and the proposed findings of

fact, conclusions of law and order, and finds them to be in accordance with the verdict of the jury and with the opinions of this court based upon that verdict, and upon the evidence as to appropriate equitable relief.

IT IS THEREFORE ORDERED:

1. That the verdict of the jury is received.

2. That the plaintiff's motion for equitable relief is GRANTED.

3. That the motions of the defendants for judgment notwithstanding the verdict and for a new trial are DENIED.

4. That judgment on the verdict be entered.

5. That the proposed findings of fact and conclusions of law tendered by the plaintiff in support of the relief sought are approved and are being entered.

6. That the court will rule on

fees for the plaintiff's attorney when and if a petition for fees is received.

This 20th day of April, 1987.

JAMES B. McMILLAN
United States District Judge

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION
C-C-85-478-M

PATRICIA MASON,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF GASTONIA; BOB ADAMS; JOE DAVIS; ROGER KAYLER; HENRY CANNON; RONNIE RANSOM; GLENDELL BROOKS; W. B. BROOKS; GARY HICKS and JIM PHILYAW,	)
	)
Defendants.	)

JUDGMENT
(Filed April 21, 1987)

This matter came on to be heard and was heard before the undersigned United States District Court Judge for the Western District of North Carolina and a jury on January 20, 21, 23 and 26, 1987, at Charlotte, North Carolina. The Court submitted

the following issues to the jury, which it answered as indicated:

1. In the period during which plaintiff was discharged, was it the policy and practice of the City of Gastonia not to discharge employees without just cause?

ANSWER: YES

2. If the answer to question 1 is "Yes," did the defendants fail to provide plaintiff a fair hearing before a neutral, unbiased decision maker?

ANSWER: YES

3. If the answer to question 1 is "Yes," did defendants violate plaintiff's right to due process of law by arbitrarily and capriciously discharging her from her job?

ANSWER: YES

4. If the answer to question 2 or 3 is "Yes," what amount of compensatory damages, if any (not

counting back pay and other monetary benefits of employment) is plaintiff entitled to recover?

ANSWER: $75,000

5. If the answer to question 2 or 3 is "Yes," what amount of punitive damages, if any, is the plaintiff entitled to recover from

(a) Defendant Adams?

ANSWER: $100.00

(b) Defendant Davis?

ANSWER: $100.00

(c) Defendant Kayler?

ANSWER: $100.00

(d) Defendant Harry Conner?

ANSWER: $100.00

(e) Defendant Ransom?

ANSWER: $100.00

(f) Defendant G. Brooks?

ANSWER: $100.00

(g) Defendant Hicks?

ANSWER: $1,000.00

Subsequent to the jury's verdict

the defendants filed a motion for J.N.O.V. and New Trial and the plaintiff filed a motion for Declaratory and Equitable Relief. The Court has entered its Findings of Fact, Conclusions of Law and Order in regard to these matters.

Based upon the foregoing verdict of the jury and the Findings of Fact and Conclusions of Law of the Court, IT IS THEREFORE ORDERED, ADJUDGED and DECREED:

1. Plaintiff shall have and recover of the defendants, jointly and severally, the sum of SEVENTY-FIVE THOUSAND and NO/100 ($75,000.00) DOLLARS with interest thereon from January 26, 1987, at the rate of 5.75% compounded daily.

2. The plaintiff shall have and recover of the various individual defendants as punitive damages the following amounts:

a. Defendant Adams the sum of $100.00;

b. Defendant Davis the sum of $100.00;

c. Defendant Kayler the sum of $100.00;

d. Defendant Harry Conner the sum of $100.00;

e. Defendant Ransom the sum of $100.00;

f. Defendant G. Brooks the sum of $100.00; and

g. Defendant Hicks the sum of $1,000.00;

The plaintiff shall recover interest on the above amounts from January 26, 1987, at the rate of 5.75% compounded daily.

3. The plaintiff shall have and recover of defendant, City of Gastonia, as backpay through April 26, 1987, the sum of $60,501.80 plus prejudgment interest, and shall recover from the defendant, City of Gastonia, the sum of $5,325.80 plus prejudgment interest for lost

insurance and retirement benefits. The prejudgment interest shall be calculated at the interest rate used at the time by the National Labor Relations Board for back wages. The rates for the relevant time periods as follows:

a. Amounts accruing 9/15/83 - 12/31/84.....10%

b. Amounts accruing 1/1/85 - 6/30/85.....13%

c. Amounts accruing 7/1/85 - 12/31/85.....11%

d. Amounts accruing 1/1/86 - 6/30/86.....10%

e. Amounts accruing 6/30/86 - 4/30/87..... 9%

4. Plaintiff shall be entitled to reinstatement by the defendant, City of Gastonia, in the position of clerical supervisor or an equivalent position. If such a position is available at the time of the judgment, plaintiff shall be immediately employed. If no such

position is available, defendant, City of Gastonia, shall offer the first vacancy in any such position to the plaintiff.

5. Plaintiff shall have and recover of the defendant, City of Gastonia, front pay from April 27, 1987, until plaintiff is reinstated by the defendant, City of Gastonia, or declines reinstatement. The amount of front pay shall be the salary and benefits now paid to the clerical supervisor in the Collections Department, but in no event shall the salary be less than the amount of $732.00 bi-weekly.

6. The defendants are ordered not to further violate plaintiff's rights or to harass or retaliate against plaintiff because of her prosecution of this action.

7. The defendants shall pay plaintiff's reasonable attorneys'

fees, costs and expenses, to be determined by the Court upon the receipt from plaintiff's counsel of a thorough record of his services.

8. Jurisdiction over this action is retained to resolve the fee matters and until such time as plaintiff has been reinstated by the City of Gastonia or has refused reinstatment.

This 20th day of April, 1987.

JAMES B. McMILLAN
United States District Judge

PATRICIA MASON, Plaintiff-Appellee,

v.

CITY OF GASTONIA; BOB ADAMS; JOE DAVIS; ROGER KAYLER; HENRY CANNON; RONNIE RANSOM; GLENDELL BROOKS; W. B. BROOKS; GARY HICKS and JIM PHILYAW, Defendants-Appellants.

No. 87-3556
No. 87-3568

United States Court of Appeals, Fourth Circuit.

Argued November 30, 1987.

Decided February 19, 1988.

Margaret Ann Anderson (Charles F. Vance, Jr.; Womble, Carlyle Sandridge & Rice; Henry M. Whitesides; Whitesides, Robinson & Blue on brief) for Appellants.

John West Gresham (C. Margaret Errington; Ferguson, Stein, Watt, Wallas & Adkins, P.A. on brief) for Appellee.

RUSSELL, WILKINS and BUTZNER Circuit Court Judges:

PER CURIAM:

Defendant appeals from a judgment entered on a jury verdict in favor of the plaintiff, Patricia Mason, who was employed as a clerical supervisor with the City of Gastonia, North Carolina, and who has filed this action against the City, members of its City council, its City manager, and its finance director asserting that she was terminated in violation of her due process rights. The district court at trial failed to make an essential determination in this case and we remand in order that it may make such determination.

The pertinent facts are not in dispute. Mason was employed by the City of Gastonia as a clerical supervisor. One of her responsibilities was to close the City's safe, make sure that it was locked, and initial a check list to show that she had done so. On

September 14, 1983, the safe door was found open after Mason had left work. Nothing was missing from the safe and the check list had been initialed both by Mason and her supervisor. However, the City considered this incident to be a serious breach of security and Mason was terminated.

The principal issue before us is whether Mason had a property interest in continued employment with the City of Gastonia, with a right to a due process hearing before termination. "A property interest in employment can, of course, be created by ordinance, or by an implied contract." Bishop v. Wood, 426 U.S. 341, 344 (1976). In asserting her claim the plaintiff relied on certain regulations adopted in an ordinance of the Council of the defendant City, designated as sections 4.4 through 4.11 of the City Employment

Regulations. The plaintiff construed these regulations to confer on her a property right in her job. The defendant at first seemed to accept that the regulations cited by the plaintiff were applicable to plaintiff's employment but argued that such regulations were intended merely to "provide a guideline to correct an employee's unsatisfactory work performance or misconduct . . ." and did not confer any property right on the plaintiff in her job. The conflicting construction of the regulations came before the district court for resolution on defendants' motion for summary judgment. The district court denied the motion, finding that the regulations "create[d] an expectation of continued employment by establishing the bases on which an employee might be discharged and the procedure which

must be followed in discharging an employee."

Prior to trial, however, the defendants represented to the court that the regulations relied on by the plaintiff had, before plaintiff's discharge, been superseded by a new regulation, section 4-46(b), which rendered plaintiff's employment as at will. The district court allowed the defendants to amend their answer by pleading these superseding regulations and at trial admitted the regulations into evidence.

The district court made no determination at trial as to which set of regulations governed Mason's employment. Rather, the district court apparently submitted the issue to the jury for its determination of the question, "In the period during which Plaintiff was discharged, was it the policy and practice of the

City of Gastonia not to discharge employees without just cause?"

The district court erred in not determining which of the two regulations governed Mason's employment and discharge and in not determining whether the applicable regulation created a property interest in employment. Plaintiff's right to recover depends upon whether she has a property interest in employment with the City of Gastonia. If, prior to her discharge, the second regulations replaced the ones relied on by the plaintiff, the question whether the plaintiff had a property right in her employment would be determined on the basis of the later regulations applicable at the time of her discharge, which would normally be a question of law for determination by the court. The

power of the City to amend or replace its earlier regulations and thereby alter the property right of an employee in her employment is, in our opinion, clear. See, Gattis v. Gravett, 806 F.2d 778 (8th Cir. 1986). Whether she has such a property interest thus depends, first, upon which city regulation was applicable to her status as an employee at the time of her discharge, and, second, on the proper construction of such applicable regulation. The district court failed to make these essential determinations and it is necessary to remand the case in order to secure the district court's determination as to which regulation was applicable to plaintiff at the time of her discharge and whether such regulation created a property right in her

employment.

Should the district judge find that the second regulation is applicable to the case and does not create a property interest in the plaintiff, the judgment herein in favor of the plaintiff should be reversed and judgment entered in favor of the defendants. If, on the other hand, the district judge finds the first regulation was applicable, then the judgment of the district court would be subject to further review by us on the correctness of the district judge's construction of the regulation sections 4.4 through 4.11 as creating a property right in favor of the plaintiff in her employment. In any event, the action must be remanded to the district court for further action in accordance with the terms of this

decision. Judgment reversed and remanded to the district court for further proceedings. REVERSED and REMANDED.

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH Carolina
CHARLOTTE DIVISION
C-C-85-478-M

PATRICIA MASON,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF GASTONIA; BOB ADAMS; JOE DAVIS; ROGER KAYLER; HENRY CANNON; RONNIE RANSOM; GLENDELL BROOKS; W. B. BROOKS; GARY HICKS and JIM PHILYAW,	)
	)
Defendants.	)

ORDER
(Filed May 2, 1988)

This case was remanded by the Fourth Circuit Court of Appeals for determination of (1) which personnel regulation was applicable to plaintiff at the time of her discharge and (2) whether such regulation created a property right

in plaintiff's employment with the City of Gastonia.

The Court has reviewed the transcript of the trial, the Court's notes made at trial regarding the testimony and the demeanor of the witnesses, the exhibits introduced at trial and the briefs and affidavits submitted by counsel, and makes the following:

FINDINGS OF FACT

1. Plaintiff was employed by the City of Gastonia in July of 1975 and worked continuously for the City until her discharge in September 1983.

2. In 1980 or 1981 the City of Gastonia adopted an ordinance governing personnel policies ("1980 ordinance").

3. The language and substance of the 1980 ordinance is typical of that used in an ordinance or statute.

4. The 1980 ordinance was, in parts pertinent to this case, substantive and not administrative.

5. The 1980 ordinance was considered as such by each of the defendants.

6. Section 4.7 of the 1980 ordinance classified city employees as either permanent or probationary employees.

7. Pursuant to the 1980 ordinance, probationary employees did not enjoy all of the rights and benefits enjoyed by permanent employees. Among the rights enjoyed by permanent employees but not probationary employees was the right to appeal to the City Manager a department head's recommendation of dismissal.

8. The 1980 ordinance defined a dismissal as "an involuntary separation from employment initiated

by the employing authority as a result of the employee's work performance or misconduct" (§ 4.9(b)).

9. Section 4.9(d) of the 1980 ordinance provided that "a dismissal may be generally considered as appropriate only as a last resort or be undertaken only when an extremely serious policy violation has occurred."

10. Section 4.9(j) of the 1980 ordinance reiterates that "dismissal is the most serious form of discipline," and required that the employee be provided a written "statement of the reasons for dismissal."

11. Section 4.9(k) of the 1980 ordinance enumerated thirteen (13) specific causes for which an employee may be suspended, demoted or dismissed. Paragraph 14 of that

section provided that employees could also be disciplined for other actions of a nature similar to the specific enumerated causes.

12. On November 16, 1982, the City of Gastonia ratified a "New Code of Ordinances" effective January 1, 1983, ("1983 ordinance").

13. Section 4-46 of the 1983 ordinance is entitled "Disciplinary Action - By Whom Imposed and Reasons Therefore."

14. Section 2 of the City Council ordinance adopting the 1983 ordinance explains that the new code is effective as of January 1, 1983, and that all ordinances enacted before July 6, 1982, are repealed except as provided for in Section 3 of the adopting ordinance.

15. Section 3 of the adopting ordinance provides that "the repeal provided for in Section 2 hereof

shall not affect:

(a) ... any contract or right established or accruing before the effective date of [the new] code; ... [or] (c) Any contract or obligation assumed by the City."

16. The city's policy and practice at the time of plaintiff's dismissal was to discharge permanent employees only for good cause (Hicks' testimony, T. 249).

Based on the foregoing findings of fact the court makes the following:

CONCLUSIONS OF LAW

1. An employee of a governmental entity such as the City of Gastonia is entitled to the safeguards of the due process clause if she has a property interest in her employment. Board of Regents v. Roth, 408 U.S. 564, 569; Pittman v. Wilson County, 839 F.2d 225 (4th Cir.

1988).

2. The sufficiency of the employee's claim of entitlement must be decided by reference to state law. Bishop v. Wood, 426 U.S. 341, 344 (1976).

3. Under North Carolina law, subject to a few well defined exceptions, "absent some form of contractual agreement between an employer and employee establishing a definite period of employment, the employment is presumed to be an at-will employment, terminable at the will of either party." Harris v. Duke Power Co., 319 N.C. 627, 629, 356 S.E.2d 357 (1987).

4. An exception to the North Carolina "employment-at-will" rule exists where a statute or ordinance provides for restrictions on the discharge of an employee. Pressnell v. Pell, 298 N.C. 715, 723, 260

S.E.2d 611 (1979)).

5. The City of Gastonia's 1983 ordinance did not repeal the contracts and rights created under the City's 1980 ordinance.

6. The terms and conditions of the 1980 ordinance were applicable to plaintiff at the time of her discharge.

7. The 1980 ordinance's distinction between probationary employees and permanent employees, its requirement that employees be given a written statement of the reasons for their dismissal, the enumeration of specific causes for which an employee may be dismissed, and the City of Gastonia's policy and practice at the time of plaintiff's dismissal of discharging permanent employees only for good cause establish that the City of Gastonia extended a property right in

continued employment to its permanent employees who were and continue to be covered by the 1980 ordinance. See, Morris v. City of Danville, 744 F.2d 1041 (4th Cir. 1984) and Detweiler v. Commonwealth of Virginia, Dept. of Rehabilitative Services, 705 F.2d 557 (4th Cir. 1983).

8. Although the City of Gastonia arguably has the power to revoke a property right previously granted to an employee, it did not exercise that power when it enacted and adopted the 1983 ordinance.

9. The decision of the City to save the property rights accrued by its permanent employees under the 1980 ordinance is in accord with the North Carolina state law trend of granting property rights in continued employment to permanent state employees and county or local employees of departments of social

services, health departments, area mental health programs and local emergency management programs. See, N.C.G.S. §§ 126-35, and 126-11.

10. The 1980 personnel ordinance, sections 4.4 through 4.11, created a property right in plaintiff's continued employment with the City of Gastonia, protected by the due process clauses of the Fourteenth Amendment of the Constitution of the United States, and plaintiff maintained that right at the time of her discharge.

The court will modify the judgment to reflect the entry of these findings and conclusions.

This 25th day of May, 1988.

JAMES B. McMILLAN
United States District Judge

PATRICIA MASON, Plaintiff-Appellee,

v.

CITY OF GASTONIA; BOB ADAMS; JOE DAVIS; ROGER KAYLER; HENRY CANNON; RONNIE RANSOM; GLENDELL BROOKS; W. B. BROOKS; GARY HICKS and JIM PHILYAW, Defendants-Appellants.

No. 88-2861
No. 88-2924

United States Court of Appeals, Fourth Circuit.

Argued June 7, 1989.

Decided August 16, 1989.

Charles Fogle Vance, Jr.; Margaret Ann Anderson (Richard L. Rainey, WOMBLE, CARLYLE, SANDRIDGE & RICE; Henry M. Whitesides, WHITESIDES, ROBINSON & BLUE on brief) for Appellants.

John W. Gresham (C. Margaret Errington, FERGUSON, STEIN, WATT, WALLAS, ADKINS & GRESHAM, P.A. on brief) for Appellee.

RUSSELL, WILKINS and BUTZNER Circuit Court Judges:

RUSSELL, Circuit Judge:

This is a public employee's action under Section 1983[1] for redress of the failure to accord her due process in the suspension and termination of her employment. It was submitted to the jury in a district court trial. The jury found that the plaintiff's discharge violated plaintiff's due process rights and returned a verdict in favor of the plaintiff. The defendant appealed. On appeal, we remanded the case to the district court to determine whether the applicable City Ordinance on personnel granted the plaintiff due process rights. The district court decided the Ordinance did vest the plaintiff with such rights and reaffirmed the earlier judgment, without considering the question,

1 42 U.S.C. § 1983.

accepting that the plaintiff had due process rights, whether she had been accorded such rights by the City in the proceedings which resulted in a decision of termination. The defendants have appealed the final judgment on two grounds: (1) the plaintiff, under the controlling City Ordinance, had no due process rights since her employment was at will; and (2) that, even of she had, the plaintiff's due process rights were satisfied by the City procedures. We reverse on the City's second ground and find no need to resolve the first issue posed by the City.

I.

The plaintiff, Patricia Mason, worked for the City of Gastonia in a clerical capacity for approximately eight years prior to her termination on September 14, 1983. She had been transferred from the Billing Division

to the Collections Division as the clerical supervisor of that Division in April of 1983. Her immediate supervisor was Blair Wilson, who in turn reported to James Philyaw, the City's finance director. The duties of the plaintiff as the clerical supervisor contemplated responsibility for the security of the collections received by the several tellers in the Collections Division. It was her duty "to close out the tellers as their payments came in daily," to see that the tellers put their drawers in the cash safe, to check the tellers' stations, to "see that all the drawers at the station[s] were locked" and "to sign behind everyone of their initials on a checklist." The safe provided by the City was for the deposit of all cash collections at the close of business each day. The combination

for the safe was to be set by the plaintiff, who was to change it periodically. She was to record the combination as selected by her on three sheets of paper, which, after being folded, were to be enclosed separately in three City of Gastonia envelopes. These envelopes were to be sealed with "my (Marion's)* initials over the seals." One of the envelopes was to be given to Mr. Philyaw, a second to Mr. Wilson, and the third was to be retained by Ms. Mason.

The plaintiff testified that she was advised of the procedure to be followed by her in seeing to the security of the City's cash collections at a meeting attended by her, at which the City Manager, Mr.

---

* The opinion of the Court of Appeals refers to Marion in an apparent reference to Mason.

Hicks, Mr. Philyaw, Mr. Wilson, and a Mr. Presley, an accountant who had devised the system when she was transferred to the Billing Division. It was explained to the plaintiff that the City had been troubled in the past by laxity in the handling of cash in the Collections Division. On one occasion, the safe in which the collections of the Division were to be placed for safekeeping at the end of the work day was found open and a substantial amount of money was missing. There was a great deal of public criticism of the laxity in the security at the time. The City officials were greatly embarrassed by this disclosure. An open safe was also discovered after closing shortly before the plaintiff was transferred. Mrs. Sandy York was at the time the clerical supervisor having the same responsibility as the supervisor in

the Collections Division as the plaintiff was to have as her successor. She was given a suspension without pay, removed as clerical supervisor in the Collections Division, and transferred to another Division. All of these details were made known to the plaintiff, who was told in addition that "we can't let this [i.e., the safe door being open after the office had been closed] happen again," that "the doors have to be locked, the drawers have to be locked up, no checks laying around any more, those papers have to be signed at the end of each day." Finally, Mr. Philyaw and Mr. Wilson "emphasized to [the plaintiff] the importance of making sure everything was secure" and that the City 'was not going to have any more mess [such as the safe being left open]" because "they were tired

of being embarrassed."

About fifteen minutes after the close of business on September 14, 1983, Mr. Philyaw went in the Collections room and discovered the safe open. Mr. Wilson and the plaintiff were called and requested to come to the City's offices at once. Two police officers of the City were brought in. An investigation immediately began. The officers first examined the safe, its handle and locks for fingerprints. There were none. They examined the Collections Office where the safe was located. There were two windows in the office. One was securely locked; the other was not locked but they found no "visible sign of forcible entry." The envelopes with the safe's combination, which had been given to Mr. Philyaw and Mr. Wilson, were examined; the seals were unbroken.

Both Wilson and the plaintiff said they had closed the safe as required, but they could offer no explanation how the safe was found open within a few minutes after they had allegedly closed the safe. The officers took a statement from Philyaw and Wilson, and two statements, a day apart, from Ms. Mason, Later, Ms. Marion (sic) was asked about the combination of the safe. She said first she kept the combination in her head but quickly amended this statement, "I do have it [the combination] in my pocketbook, my billfold. I have it this time because I've recently changed it a month or so ago because I had been out and when I changed it, I keep it sometimes I am afraid I will forget it in the morning so I have it. I do have it in my billfold."

In her first interview, Ms.

Mason explained the procedure followed in closing the safe and then, after giving her steps in closing the safe, said that normally "I will turn around and go back in there and check and make sure everything is turned off but today [September 14], I did not go back in there. I don't do it everyday but, today, I didn't go back in there. Most of the time, I do. Today, I didn't." The next day she was asked by the investigating officers:

> Q. "Thinking back of yesterday, remembering about closing the safe or anything, is there any doubt whatsoever in your mind as to whether or not you closed that safe? Do you have any doubt at all?
>
> A. No, I think I might have thought I did last night when I was talking to ya'll but, when I got home, I was just sitting there thinking and I could see myself. I know the very words I said when I pushed the handle and right before I turned it, I turned

around and I said, is that it? Because like I said I've locked it before and have to open it again because one of the tellers hadn't put some money in it. And, I said, is that it and when they say yes, that's it, I turned around and I'm turning the dial. I got my hands on it all the time I'm saying it. And usually, Blair's standing right behind me when I'm saying this, or right around me.

CROSBY: But, particularly last night, you can't remember exactly where Blair was when you closed it.

MASON: He was back there but, I don't know exactly where he was standing.

The officers also interviewed and took statements from the three tellers. It is intimated by the plaintiff that one of these tellers, Ms. Pratt, had said she had seen Ms. Mason close and lock the safe on the evening of September 14. The actual statement of Ms. Pratt in response to the investigator's direct question,

"Did you see her [Ms. Mason] secure the safe," was:

> I didn't see Pat but Pat does the safe first and then Blair does Pat's. Now, I was the last one locking up. Blair was standing there beside the safe as usual waiting for me to lock my drawer inside the safe and Blair was standing there so, when I turned around Pat was already at my station giving it a third check. All my drawers was locked because I saw Pat jerk on them. When I turned around to go to her desk to sign my name and the time, that's when I saw Blair--he was over there jerking on the handles. You know, you can hear it, you know. He gives it a jerk.

It is obvious that Ms. Pratt did not testify she saw Ms. Mason close the safe.

On September 16, 1983, Mr. Philyaw made a report of the incident to the Mayor, Councilmen and City Manager. He recounted the investigation of the incident and the action he had taken as a result of

it. He reported that, after completing the investigation, he consulted the City's auditor. After going over an analysis of the event, the accountant said that the City "had the proper controls in place and if these controls had been followed, the safe would not have been left open. He felt, as we do, that the problem was not the controls but the people following these controls." The accountant concluded that "considering the circumstances the only thing that [the City] could do would be to terminate the employees." Mr. Philyaw then interviewed the City's attorney, who, after a review of the incident also said, "that because of the circumstances involved in this incident and, also, in the most recent incident of the same magnitude on April 19, 1983, and the lingering accounts of the incident of

February 1981, we had no choice but to terminate these employees." Philyaw proceeded to ask Wilson and Mason to resign, telling them that the investigation of the September incident was caused by carelessness. Wilson, the first to be interviewed, said he would not resign, that Philyaw would have to "fire" him. Mason took the same view. Philyaw gave both of them a letter terminating their employment. All of this Philyaw included in his report.

Ms. Mason understood that she had a right under the applicable City procedures to appeal her dismissal to the City Manager. She, as well as Wilson, did appeal. They were given a hearing before the City Manager in October 1983. At this hearing "the plaintiff [Mason] was informed that this procedure was a preliminary hearing and that she would receive

her 'due process' hearing before the City Council."[2] Evidence was taken from a number of witnesses. At the end of the hearing, Ms. Mason said that she had conducted an experiment and that she had found that when the envelope in which the safe combination had been placed was held to the light the safe combination could be discerned. This evidence was presented to the City Manager. He, however, sustained the recommendation of Philyaw, declaring in his decision of October 26, 1983, that it was the duty of Ms. Mason to see to "the security of the safe" and that "by virtue of [her] position [she was] accountable for incidents that occur within [her] purview."

Ms. Mason, as well as Wilson,

---

2 This statement is quoted from a brief submitted in this case by counsel for Ms. Mason, Appendix p. 74.

appealed to the City Council. At the hearing on this appeal on November 15, 1983, all the evidence which was presented to the City Manager, including the additional statement of Ms. Mason that she could see the safe combination on the slip in the envelope when the envelope was held to the light, was before the City Council. There is no contention that Ms. Mason requested the right to offer any evidence other than that reported in the transcript of the hearing before the City Manager, which transcript was before the Council. In addition, counsel for Ms. Mason was permitted to present his argument on behalf of Ms. Mason. The council asked both Philyaw and Ms. Mason to take an audio stress test. Both agreed and both successfully passed the test. The Council thereafter offered to

reinstate Ms. Mason and Wilson without back pay for the time they were out of work during the investigation of the open safe incident and the execution of a release of liability. Wilson accepted the offer but Ms. Mason refused. Under those circumstances, Ms. Mason's termination was sustained by the Council.

Approximately two years later, on August 2, 1985, Ms. Mason filed this action claiming (1) that she was a permanent employee entitled to a due process hearing before termination under the applicable City ordinances; (2) that she had not been granted a procedural due process hearing before an impartial decision-maker; and (3) that she had been denied substantive due process by her arbitrary and capricious discharge. At trial, the City's motion for a

directed verdict was denied. The cause was submitted to the jury which found in favor of Ms. Mason. That decision was appealed by the City.

On appeal, the initial issue was whether Ms. Mason had a right to procedural due process as a condition to severe discipline or discharge. Initially, the parties seem to have assumed that the City Ordinance on personnel adopted in 1980 was controlling on this issue. It later developed that in 1983, the City Council had adopted another ordinance governing personnel rights and in many respects repealing the provisions of the 1980 ordinance. Since Ms. Mason's termination occurred in 1983, it became important to ascertain which ordinance was dispositive of Ms. Mason's right to a due process hearing. This issue had not been resolved by the district

court. It was necessary, therefore, to remand the cause to the district court to determine this point. Thus, in an unpublished opinion, we remanded the case for that purpose and did not consider the question whether the applicable ordinance granted Ms. Mason procedural due process in a suspension or termination of employment.

The district court, on remand, reviewed the two ordinances and found the Ordinance ratified on November 16, 1982, "to be effective January 1, 1983," applied to Ms. Mason's suspension or termination. But, it found that such Ordinance provided that the repeal of the right to procedural due process given Ms. Mason under the 1980 ordinance had not been affected by the repeal provision of this Ordinance, since the later Ordinance in Section 3

thereof declared

> the repeal provided for in Section 2 hereof [of the 1980 Ordinance] shall not affect: (a) . . . any contract or right established or accruing before the effective date of [such] Code.

Having found such, the Court ordered judgment in favor of the plaintiff in accordance with the jury verdict. From that judgment the City has appealed.

II.

The question whether the 1983 ordinance preserved the procedural due process rights of Ms. Mason under the 1980 ordinance has been extensively argued by the parties. Accepting, for the purpose of this case, the district court's conclusion that Ms. Mason's due process rights were preserved, we hold that Ms. Mason clearly received her procedural due process rights, as those rights

are prescribed in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541-46 (1985). The Supreme Court there identified the "due process" required in the discharge or disciplining of a public employee to be not an "elaborate hearing" but simply one which must be "preceded by notice and opportunity for hearing appropriate to the nature of the case." It later spelt out more specifically these requirements in a case such as this. It said:

> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See, Friendly, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation

> of the employer's evidence, and an opportunity to present his side of the story. See Arnett v. Kennedy, 416 U.S., at 170-171 (opinion of Powell, J.); id., at 195-196 (opinion of White, J.,); see also Goss v. Lopez, 419 U.S., at 581. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

470 U.S. at 546.

"Due process" in a permanent employee discharge case is thus satisfied when, after notice of the charges and an explanation of the employee's evidence, the employee is provided an opportunity "to present reasons, either in person or in writing" and "an opportunity to present his side of the story." Ms. Mason was unquestionably granted such a hearing. She had a hearing before the City Manager and finally before the City Council. She was

represented in both instances by counsel of her choice. There was a record made at the hearing before the City Manager; witnesses were heard; and Ms. Mason's counsel was accorded a full opportunity to "present [her] side of the story" on the record. That record was offered at the hearing before the City Council. Counsel, by his own admission, was given an opportunity to set forth fully Ms. Mason's side of the case at that time. Ms. Mason has identified no facts or arguments she wished considered which either the City Manager or the City Counsel denied her a right to adduce at such hearings. There was actually no dispute on the facts relating to Ms. Mason's initial supervision and later termination. Nor could there have been much dispute about the action taken. The safe was found open

within 15 minutes after closing on September 14. There was no indication of forcible entry. Only three people had access to the safe through their possible access to the combination. Two of these could only obtain the combination by breaking the seal and reading the enclosure in the envelope they had. The envelope in the possession of both were examined and the seal was unbroken. Ms. Mason knew the combination, since she had set the combination and she had the combination in her billfold in her envelope. It seems fair to assume that no one of the three had opened the safe after it had been bolted. The contents of the safe were not disturbed. It was clearly a case, in any event, of carelessness. Such carelessness was, however, the very thing the City was seeking to prevent. Ms. York had been suspended

without pay and transferred to another division, exactly what was offered Mason and Wilson and which Wilson accepted and Mason declined. Ms. Mason knew this. She had been warned that the City was not going to tolerate another act of the safe being found open. There was a reasonable basis for the decision of the City Council, though it would seem no such decision is required under the test of procedural due process in this context, a point we later address.

Ms. Mason suggests first that the procedure followed in her hearing was defective, in that she should have been given a full-blown trial-like hearing before the Court. Loudermill makes plain that such is not required, and this is especially so since there was no dispute over

the known facts in this case.[3] Neither are we required in a Section 1983 action by a discharged public employee to pass on the propriety of a disciplinary discharge or disciplinary suspension to determine whether it was rationally warranted. As the Supreme Court in Bishop v.

---

3 Justice Brennan, in his concurring and dissenting opinion in Loudermill dealt conclusively with this point. He wrote

> First, the Court today does not prescribe the precise form of required pretermination procedures in cases where an employee disputes the facts proffered to support his discharge. The cases at hand involve, as the Court recognizes, employees who did not dispute the facts but had "plausible arguments to make that might have prevented their discharge." Ante, at 544. In such cases, notice and an "opportunity to present reasons," ante, at 546, are sufficient to protect the important interests at stake.

470 U.S. at 552

Wood, 426 U.S. 341, 349-50 (1976) put it:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

We have consistently followed this ruling in Bishop. Thus, in Clark v. Whiting, 607 F.2d 634, 638-39 (4th Cir. 1979), we said:

> Federal courts thus have never been hesitant to intervene on constitutional grounds in the hiring, discharging or promotion of public employees, including academic personnel, where the asserted claim is that the action taken was tainted by racial or sex discrimination or was intended to penalize for the exercise of First Amendment rights. But absent such impermissible sex or racial discriminations or First Amendment restraints--clear violations of positive express constitutional or statutory mandate--"[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.

See also Garraghty v. Jordan, 830 F.2d 1295, 1302 (4th cir. 1987); Daniels v. Quinn, 801 F.2d 687, 691 (4th Cir. 1986) ("Due process principles did not require a neutral decision-maker, rather than Jordan, make the decision to suspend Garraghty. A deprivation proceeding need not be a full evidentiary

hearing with witnesses and a neutral decision maker so long as the employee is given an opportunity to answer the charges." 830 F.2d at 1302).

The appellee contends, however, that the City Manager, Hicks, who had held the "preliminary hearing," did not qualify as a neutral and impartial decision maker and, in that circumstance, there was a violation of due process. She bases this position on the fact that Philyaw said at one time in his presentation that he had conferred during the investigation of the open safe on September 14 with Hicks. This fact, disputed by Hicks and supported only by Philyaw's oblique statement, did not disqualify Hicks or render his decision (assuming it was the final decision which it was not) from hearing Ms. Mason's appeal. See

Garraghty v. Jordon, supra, and DeSarno v. Department of Commerce, 761 F.2d 657, 660 (D.C. Cir. 1985). In the latter case, the Court said:

> At the pre-termination stage, it is not a violation of due process when the proposing and deciding roles are performed by the same person. The law does not presume that a supervisor who proposes to remove an employee is incapable of changing his or her mind upon hearing the employee's side of the case.

It is not, however, necessary to consider whether Hicks, the City Manager, was neutral and impartial. His was not the final decision. This was made clear at the beginning of the hearing before him. Hicks emphasized at the hearing before him that the "final due process" hearing would be for the City Council. App. at 74. There is no real charge of partiality by Ms. Mason against any member of the City Council, and it

was the Council which made the final decision. Further, their decision demonstrated the Council's impartiality. Their disposition of the appeal was similar to that earlier made in the similar case of Ms. York.

The appellee, whether because she recognized the weakness of her position on an alleged due process claim or not, asserts that the decision of the City Council violated her substantive due process rights because it was arbitrary and capricious. In essence, what Ms. Mason seeks by this claim of alleged violation of her substantive due process is to secure a trial of the reasons for her suspension which, by her refusal to accept such suspension, had been converted into a termination of employment. That is precisely what the Court declared in

its language quoted supra:

> In the absence of any claim that the public employee was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

426 U.S. at 350.

Of course, had Ms. Mason's suspension and later discharge been motivated by racial or sex considerations or by a First Amendment violation, she might have some right of action. Bishop v. Wood, supra. But there is no such claim asserted by Ms. Mason in this case. We might add, also, that if the plaintiff in this case had a right to contest in this 1983 action the merits of the discharge--whether

arbitrary or capricious--the record shows a clear rational basis for the council's decision, a fact we have already noted.

To conclude: We find in this record no evidence of a violation of the due process rights of the plaintiff (Mason) and, therefore, we vacate the judgment below in favor of the plaintiff and remand the cause to the District Court with instructions to dismiss the action. REVERSED AND REMANDED WITH INSTRUCTIONS.

PATRICIA MASON, Plaintiff-Appellee,

v.

CITY OF GASTONIA; BOB ADAMS; JOE DAVIS; ROGER KAYLER; HENRY CANNON; RONNIE RANSOM; GLENDELL BROOKS; W. B. BROOKS; GARY HICKS and JIM PHILYAW, Defendants-Appellants.

No. 88-2861
No. 88-2924

United States Court of Appeals, Fourth Circuit.

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

(Filed October 3, 1989)

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Russell with the concurrence of Judge Wilkins and Judge Butzner.

For the Court,

JOHN M. GREACEN, Clerk

Plaintiff's
Exhibit 20

REGULAR COUNCIL MEETING
December 6, 1983

DECISION ON HEARING TO REVIEW THE TERMINATION OF BLAIR WILSON AND PAT MASON

1. The safe was open at 5:14 p.m. on September 14, 1983.

2. It was the duty of Pat Mason to lock the safe at the end of each day and to initial the log showing that she had done this.

3. It was the duty of Blair Wilson to check behind Pat Mason to insure that the safe was locked and to initial the log showing that this had been done.

4. Pat Mason initialed the log as of 5:01 and Blair Wilson initialed the log as of 5:03 on the 14th of September 1983.

5. Once the log has been signed or initialed, the employees left the office, went out into the hallway, and then out of the building.

6. Jim Philyaw was in the tax collection office next door to the utility collection office during all this time, and he went into the utility collection office at 5:14 p.m. on September 14, 1983. When he entered the utility collection office there was no one else in the room and

he noticed that the safe door was open at a 45 degree angle. Jim Philyaw immediately called the Gastonia police from that office and did not leave the office until after the police had arrived.

7. The Gastonia police detective concluded that there was no forced entry into the safe. No one has challenged this or ever disagreed with this.

8. An employee, Mrs. Alberta Pratt, later questioned and she said that she remembered hearing Blair Wilson spin the dial on the safe.

9. The combination was set by Pat Mason and she delivered an envelope to Blair Wilson and to Jim Philyaw which contained the combination. This envelope was to be sealed. The detective stated that the envelope with the combination did not appear to have been opened. This was not challenged. However, the envelope given to Jim Philyaw was prepared in such a way that the combination could be read through the envelope. It was Pat Mason's duty to properly prepare these envelopes.

10. Jim Philyaw took a stress evaluation test and the test indicated that he was truthful when he said:

    (a) The safe was open when he entered the room
    (b) He did not open the safe

(c) He does not know who did open the safe.

11. Blair Wilson took a stress evaluation test and the test indicated that he was truthful when he said:

(a) I did check the safe and it was locked
(b) I did not unlock the safe thereafter
(c) I do not know who did open the safe.

12. Pat Mason took a stress evaluation test and the test indicated that she was truthful when she said:

(a) I did lock the safe
(b) I did not thereafter unlock the safe
(c) I do not know who did open the safe.

13. When the safe was found open on September 14, 1983, after the detectives and others had arrived, the contents of the safe were examined. There was slightly over $32,800.00 in the safe at that time. The City policy is that there should only have been $1,950.00 in the safe. It was Pat Mason's responsibility to see that there was no excess money in the safe.

Based upon the foregoing, Council agrees with the actions of the City Manager, however, based upon the entire factual situation, the cooperation of the parties, and all the

evidence presented, the City Council hereby modifies the City Manager's decision as follows:

1. Pat Mason and Blair Wilson may return to their offices to work as assigned tomorrow morning at 8:00 a.m.

2. They will have their same pay and seniority.

3. There will be no back pay or other concessions.

4. Pat Mason and Blair Wilson shall sign a release and a covenant not to sue the City of Gastonia for any and all events connected with the open safe on September 14, 1983.

5. If the covenant not to sue and the release are not signed by 5:00 p.m. this day, then the party not signing shall not be allowed to return to work tomorrow morning.

6. If the release and covenant is not signed, the City Manager shall consider the job vacate and shall immediately advertise to fill the vacancy.

7. The release and covenant not to sue shall be prepared by the City Attorney and shall be available by 2:00 p.m. this date.

8. If Blair Wilson is incapacitated, he may report to work and then the City Manager shall take appropriate

administrative action.

Upon motion of Councilman Adams, seconded by Councilman Brooks, the Council voted unanimously to approve this policy as submitted.

There being no further business to discuss, upon motion of Councilman Davis, seconded by Councilman Kayler, the Council voted unanimously to adjourn at 12:15 p.m.

_____
MAYOR

_____
Assistant City Attorney

Ruth A. McNamara
Deputy City Clerk